No. 14,596

IN THE

United States Court of Appeals

For the Ninth Circuit

JERRY LEE REESE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction is invoked under Section 3231 of Title 18 United States Code and Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on July 21, 1954 for failing to report to his local board for instructions to proceed to a place of employment for the purpose of civilian work contributing to the maintenance of the national health, safety and interest (Tr. 3, 4). On September 9, 1954 appellant was tried before United States Dis-

trict Judge Oliver J. Carter (Tr. 12). After denial of a motion for acquittal, appellant was adjudged guilty as charged (Tr. 9). Timely appeal was taken to this Court from that judgment (Tr. 11).

FACTS.

Appellant registered with his local board on August 3, 1949 (File 1, 2). He filed his classification questionnaire on July 6, 1949 (File 6). In this form he listed the job he was then working at as construction work (File 8). On September 8, 1950 he filed his Special Form for Conscientious Objector (File 19). He stated that the leader of his congregation was Mr. Fred Howell, Sacramento and Nord Avenues, Chico, California—Company Servant (File 21). On December 10, 1951 appellant had a personal appearance before his local board (File 26). At this personal appearance he was *asked* if he had attended or graduated from a recognized Theological Seminary or Bible Institute (File 26). Appellant, at page 4 of his brief, declares that his claim for a minister's classification was rejected "apparently because he had not 'attended or graduated from a recognized Theological Seminary or Bible Institute.' " There is nothing in the record which indicates that such was the case. The file only reveals that appellant was *asked* this question.

Appellant was classified by his local board in Class I-A on December 10, 1951 (File 36). He appealed this classification on December 19, 1951, listing two grounds—(1) that he was a minister and (2) that

he was conscientiously opposed to participation in war (File 34). The Appeal Board on January 10, 1952 classified him I-O (File 36). On September 17, 1952 appellant filed his Special Report for Class I-O Registrants (File 66). On page 68 he listed various jobs he had held since April 1, 1949. He declared he was still employed by Milan and Lund, Brick Contractors, as an apprentice bricklayer. On October 23, 1952 he filed an Apprentice Deferment Request (File 73).

On February 24, 1953 the local board requested appellant to indicate his preference of three jobs which had been approved for the employment of conscientious objectors (File 76). Appellant, in accordance with this request, stated that he applied for an occupational deferment as an apprentice bricklayer and declined to take any other occupation "than my present one" (File 77).

On August 12, 1953 appellant again appeared before his local board. The summary does not indicate that he discussed his ministerial claim at that time (File 96). On October 22, 1953 appellant wrote a letter in which he claimed that he was presenting new evidence in his case (File 102). He there stated that he was an "Area Study Conductor." In addition, he stated "My wife and I are planning now so that by next summer we will be able to enter the full time ministry and devote 100 hours a month each in regular preaching activity (File 103)." On November 4, 1953 the local board reviewed "the complete file" of appellant and did not change appellant's classifica-

tion (File 108). On February 15, 1954 appellant was ordered to report to his local board on February 25, 1954 for instructions to proceed to his place of employment (File 131). On February 23, 1954 he acknowledged receipt of this order and requested a personal appearance (File 133). This request was received on February 26, 1954 by the local board, one day after the appellant had failed to report as ordered (File 133, 138).

QUESTIONS PRESENTED.

1. Did appellant exhaust his administrative remedies?

2. Is there basis in fact for denying a ministerial classification where the registrant works as a full time bricklayer?

3. Is the conscientious objector work program constitutional?

4. Was appellant deprived of a fair hearing?

5. Did the failure to reopen appellant's classification deprive him of due process of law?

ARGUMENT.

I. APPELLANT HAS NOT EXHAUSTED HIS ADMINISTRATIVE REMEDIES.

Appellant refused and failed to report to his local board on February 25, 1954 for instructions to proceed to the place of employment designated by the

board (Tr. 15, 19). By failing to report, he neglected to complete the administrative process.

In *Falbo v. United States,* 320 U.S. 549, the Supreme Court held that where a conscientious objector had failed to report for work of national importance, he had not exhausted his administrative remedies and was not entitled to judicial review of his classification. There has been no intimation that the *Falbo* case has been overruled. This Court should not do so now.

In *Williams v. United States* (9th Cir.), 203 F.2d 85, this Court declared that the Act "requires a registrant to come to the brink of induction before he may obtain judicial review . . .Prior to the time when a selectee is found acceptable any injury has not materialized since he might be rejected" (at page 88). See also *Rowland v. United States,* 207 F.2d 621; *Estep v. United States,* 327 U.S. 114, 115-116. This Court has recently reaffirmed the principle that there is no judicial review where a registrant has failed to report in *Mason v. United States* (9th Cir.), No. 14,286, decided December 9, 1954.

In this case if appellant had reported, the position which he was ordered to might have been filled. Transportation might not have been available. The letter the local board received on February 26 could be acted on perhaps favorably to his claim. More important, the County of Los Angeles might have refused to hire him after an opportunity to look at him in person. They very well might have decided that he was neither morally nor emotionally fit to do

the important work of the Los Angeles Department of Charities. Appellant's frantic efforts to avoid service might indicate the kind of personality which would not fit in with welfare work.

The United States District Court for the Southern District of California has held that the "brink of induction" in conscientious objector work cases is reporting to the local board. *United States v. Sutter,* 127 F. Supp. 109. We think, however, the administrative process properly is not exhausted until the registrant is found acceptable by his place of employment.

II. THERE IS BASIS IN FACT FOR DENYING A MINISTERIAL CLASSIFICATION WHERE A REGISTRANT WORKS AS A FULL TIME BRICKLAYER.

Section 16(g)(3) provides as follows:

> "The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

The evidence before the local board is undisputed and it is apparently admitted by appellant (App.

Br. page 14) that Reese earned his living as a bricklayer. Appellant even asked for deferment on that ground (File 77). Even though the file reveals that appellant incidentally or irregularly preached and taught the principles of his religion, he was not entitled to deferment if his primary vocation was that of a bricklayer. In *Dickinson v. United States,* 346 U.S. 389, the situation was that the defendant's primary vocation was as a minister and he worked as a photographer incidentally for a limited period of time. In our opinion, there is not a scintilla of evidence in the file that Reese was acting at the time of his classification as a full time minister. He, himself, declared in his conscientious objector form that one Fred Howell was the leader of his congregation (File 21). But the only question in these cases is whether there was a basis in fact for the administrative agency to act as it did. Is there basis in fact for a local board to deny a ministerial classification where a registrant works as a full time bricklayer and applies for deferment as an apprentice? To ask this question is to answer it.

III. THERE IS NO EVIDENCE THE LOCAL BOARD REJECTED APPELLANT'S CLAIM BECAUSE HE HAD NOT ATTENDED A THEOLOGICAL SEMINARY.

Appellant argues vigorously that the local board rejected his claim for deferment as a minister on the ground that he had not attended a religious seminary. He cites a number of cases which, in his opinion, hold that such action by a local board would invalidate

his classification. It might be argued that the Appeal Board was set up to correct such mistakes by the local board. This Court has held to that effect in *Tomlinson v. United States* (9th Cir.), 216 F.2d 12, 16; *Cramer v. France* (9th Cir.), 148 F.2d 801; *Tyrrell v. United States* (9th Cir.), 200 F.2d 8, and *Reed v. United States* (9th Cir.), 205 F.2d 216. However, appellant is setting up a straw man. The local board did not reject appellant's claim on the basis argued by appellant. The local board merely asked a question. Since attendance at one of these schools would be grounds for deferment under Section 6(g) of the Act, this question would appear to be relevant and in appellant's interest. His past attendance at one of those institutions would certainly have a bearing on the question of his present status. Appellant is speculating. The mere fact that someone asks a question is not sufficient evidence to prove that he or the board decided appellant's case in accordance with appellant's answer.

IV. THE CONSCIENTIOUS OBJECTOR WORK PROGRAM IS CONSTITUTIONAL.

Appellant's brief on this question was filed prior to the decision of this Court in *Niles v. United States,* No. 14,452, dated March 16, 1955, holding that the work program was constitutional in precisely the same circumstances as here. This case was decided in the face of exactly the same arguments as are urged here. Appellant, at page 15 of his brief, indicates that the

General Counsel of Jehovah's Witnesses influenced this section of appellant's argument. A comparison with the brief in *Niles v. United States,* supra, indicates that that brief was also influenced by the same hand. For cases adjudging the 1940 program constitutional see *Richter v. United States* (9th Cir.), 181 F.2d 591; *Penor v. United States* (9th Cir.), 167 F.2d 553; *Hopper v. United States* (9th Cir.), 142 F. 2d 181; *Atherton v. United States* (9th Cir.), 176 F.2d 835; *Wolfe v. United States,* 149 F.2d 391; *Roodenko v. United States* (10th Cir.), 147 F.2d 752; *Kramer v. United States,* 147 F.2d 756; *Brooks v. United States,* 147 F.2d 134; *United States v. Van Den Berg,* 139 F.2d 654; *United States v. Mroz,* 136 F.2d 221.

V. APPELLANT WAS NOT DEPRIVED OF A FAIR HEARING.

Appellant claims that allowing him five minutes for his appearance was a denial of due process of law. He cites at page 41 of his brief, without any record citations, that the ministry of Jehovah's Witnesses is not well understood by local draft boards. The experience of this Court will indicate to the contrary. The majority of cases which involve ministerial and conscientious objector classification problems have involved Jehovah's Witnesses.

The business of a Selective Service Board does not allow an unlimited presentation of argument by one registrant. The interests of other registrants of the board must be considered. At page 26 of the file the summary reveals that appellant left "the testi-

mony which he had along with him (in written form) for the Board to review." At the trial below appellant admitted that the written argument was a fair likeness of what he intended to convey to the board at the time of the hearing (Tr. 47). A reading of the record in the Court below indicates that appellant was somewhat at a loss as to what, if anything, of substance he would have presented to the board if additional time had been granted him. As a matter of fact, nowhere in the record does he claim that he asked for more than the five minutes which was granted him. Under these circumstances, it is our opinion that appellant, as in *Tomlinson v. United States,* supra, *Martin v. United States,* 190 F.2d 775 and *Simon v. United States* (9th Cir.), 218 F.2d 127, 130, has not been deprived of a fair hearing before his local board.

VI. THE FAILURE TO REOPEN APPELLANT'S CLASSIFICATION DID NOT DEPRIVE HIM OF DUE PROCESS OF LAW.

Appellant twice requested that the local board reopen his classification. On the last occasion this request was received by the local board *the day after* the failure to report which resulted in appellant's indictment. We do not believe that appellant seriously argues that this request (File 133) has any bearing in this case. Appellant, however, at page 44 of his brief, does argue that this information should have been considered by the board. Perhaps if appellant had reported to work as required, it might have. How-

ever, appellant did not give the board this opportunity. He failed to exhaust the administrative processes so to be himself in a position to benefit from this request.

As to the first request for reopening, that of October 22, 1953 (File 102), the information presented, even if true, would not have warranted a reopening of appellant's classification. In that letter appellant stated "My wife and I are planning now so that by next summer we will be able to enter the full time ministry and devote 100 hours a month each in regular preaching activity (File 103)." The information presented to the board indicated only that appellant intended to become a minister at some time in the future. This would not require a *present* reclassification. When appellant became a minister, then was the time for him to request an opportunity to reopen his classification. From the material in the file apparently appellant never did get around to becoming a full time minister but remained at his usual and customary occupation, that of a bricklayer.

CONCLUSION.

Appellant has not exhausted his administrative remedies. He, therefore, is not entitled to judicial review of his varied claims of error. After being given the conscientious objector classification he requested, appellant refused to even make this small sacrifice for the interests of his country. No error having been demonstrated in either the administrative

processes or in the Court below, we ask that the judgment of conviction be affirmed.

Dated, San Francisco, California,
April 4, 1955.

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